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8 Attorneys for Petitioners
THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC
9 COMPANY LLC and SALMON CREEK LLC

10
11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12
13 In the Matter of:

14 May 15, 2006 Notice of Rescission of Interim
15 Enrollments of Specified THPs in the Freshwater
16 Creek and Elk River Watersheds in General
17 Waste Discharge Requirements (GWDRs) Order
No. R1-2004-0030 (North Coast Regional Water
Quality Control Board)

18 THE PACIFIC LUMBER COMPANY, SCOTIA
19 PACIFIC COMPANY LLC and SALMON
CREEK CORPORATION,

20 Petitioners.

SWRCB/OCC File

**PETITION FOR REVIEW OF
REGIONAL WATER BOARD
MAY 15, 2006 NOTICE OF
RESCISSION**

(Request for Consolidation with
SWRCB/OCC File A-1692**)**

21
22 **INTRODUCTION**

23 The Pacific Lumber Company, Scotia Pacific Company LLC, and Salmon Creek LLC
24 (collectively "PALCO" or "Petitioners") hereby petition for review of the May 15, 2006 letter of
25 the Executive Officer of the North Coast Regional Water Quality Control Board ("Regional
26 Water Board") concerning the enrollments of specified THPs in the Freshwater Creek and Elk
27 River Watersheds under General Waste Discharge Requirements Order No. R1-2004-0030
28 ("GWDR"). The letter purports to rescind the enrollment of PALCO's THPs under the GWDR

1 due to the adoption of Watershed Wide Waste Discharge Requirements ("WWDRs") in the
2 subject watersheds. PALCO is committed to the success of those WWDRs. However, it remains
3 uncertain whether those WWDRs will be successfully implemented, including whether they will
4 withstand the challenge recently submitted by parties adverse to PALCO in the WWDR
5 proceedings. In the event the WWDRs are vacated or modified, the conditions upon which the
6 May 15, 2006 letter purports to be predicated will cease to exist. Under those circumstances, the
7 letter would be void and should also be vacated.

8 This Petition for Review is brought pursuant to the provisions of California Water Code
9 section 13320 and Title 23 of California Code of Regulations sections 2050 and 2053.

10 To avoid confusion and to conserve the resources of the State Board and the parties,
11 PALCO requests that this petition be consolidated with SWRCB/OCC File A-1692. "The board
12 may order two or more proceedings which are legally or factually related to be considered or
13 heard together unless any party thereto makes a sufficient showing of prejudice." Cal. Code
14 Regs. tit. 23, § 2054. The State Water Board's File A-1692 is still pending and involves the
15 review of the same enrollments of THPs under the GWDR that are the subject of the May 15,
16 2006 letter. Through consolidation, the State Water Board can appropriately consider all actions
17 relating to the enrollment of PALCO's THPs under the GWDR in one proceeding.

18
19 **PETITION FOR REVIEW AND REQUEST FOR HEARING**

20 **I. NAME AND ADDRESS OF PETITIONERS**

21 The Pacific Lumber Company
22 Scotia Pacific Company LLC
23 Salmon Creek LLC
125 Main Street
24 P.O. Box 37
Scotia, California 95565
(707) 764-2222

25 **II. SPECIFIC ACTION OF THE REGIONAL WATER BOARD**

26 This Petition appeals the May 15, 2006 letter of the Executive Officer of the Regional
27 Water Board concerning the enrollments of specified THPs in the Freshwater Creek and Elk
28 River Watersheds under the GWDR. A true and correct copy that letter is attached as **Exhibit A.**

sf-2145661

1 **III. DATE OF THE REGIONAL WATER BOARD ACTION**

2 The Regional Water Board's action was taken on May 15, 2006.

3 **IV. STATEMENT OF REASONS WHY THE REGIONAL WATER BOARD**
4 **ACTION WAS INAPPROPRIATE AND IMPROPER**

5 Reduced to its essence, the May 15, 2006 letter effectively finds that the previous
6 enrollment of PALCO's THPs under the GWDR is moot due to the adoption of the WWDRs.
7 The State Board took the same position, only to have the Humboldt County Superior Court
8 explain in a letter dated June 6, 2006 that the issues are not moot. For example, if the WWDRs
9 are modified or vacated, they may no longer operate to "compel" the rescission of enrollment. As
10 a result, the May 15, 2006 letter was at the very least premature. There are also serious questions
11 as to whether, in any event, the Executive Officer's exercise of the purported rescission authority
12 is appropriate in the circumstances of this case. Rather than proceed on separate tracks, PALCO
13 submits that this Petition should simply be consolidated with SWRCB/OCC File A-1692 so that
14 one proceeding will comprehensively address the status of PALCO's enrollments under the
15 GWDR.

16 **V. MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED**

17 Ever since the enrollment of PALCO's THPs under the GWDR was stayed in April 2005,
18 PALCO's operations in the two watersheds have been either severely limited or shut down
19 entirely. The impacts to PALCO, its contractors, and the regional community have been
20 identified and detailed in the administrative record repeatedly throughout this process. PALCO is
21 hopeful that the controversial nature of these proceedings is over, and that the adoption of the
22 WWDRs will prove to be a turning point that results in stable timber operations. However, the
23 debilitating impacts to PALCO and its dependent community will continue, and may be
24 exacerbated, if the WWDRs are not successfully implemented (including in a timely fashion).
25 Due to the uncertainty surrounding the WWDRs, including an adverse challenge to the WWDRs
26 by ERRRA et al., seeking to shut down PALCO's operations, PALCO must preserve its options
27 under the THPs that were properly enrolled under the GWDR. PALCO reserves the right to
28 supplement, if necessary, the manner in which it is aggrieved.

1 **VI. SPECIFIC ACTION REQUESTED BY THE PETITIONERS**

2 At this time, PALCO respectfully requests that this petition be consolidated with
3 SWRCB/OCC File No. A-1692 so that the May 15, 2006 letter will also be at issue in those
4 proceedings. PALCO reserves the right to further request any and all actions authorized in Water
5 Code Section 13320.

6 **VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**
7 **PETITION**

8 PALCO has repeatedly indicated that it is committed to the successful implementation of
9 the WWDRs, but, already one party adverse to PALCO has submitted a petition seeking to vacate
10 the WWDRs and requesting a cease and desist order. Even if the adverse party does not prevail
11 before this Board, the party may still go to court in search of a remedy. Unless and until the
12 WWDRs are successfully implemented and all challenges are exhausted, PALCO must preserve
13 its rights to the previously enrolled THPs under the GWDR. In the event the WWDRs cannot be
14 implemented, the State Board should order that the May 15, 2006 letter be vacated as void
15 because the condition precedent to the letter's issuance—the WWDRs—will no longer exist. An
16 independent ground for vacating the letter is the impropriety of the Executive Officer's exercise
17 of the purported rescission authority in the circumstances of this case.

18 In submitting this petition, PALCO reserves the right to supplement its position in all
19 further proceedings, including all further proceedings in SWRCB/OCC File No. A-1692.

20 **VIII. LIST OF INTERESTED PARTIES¹**

21 The Pacific Lumber Company
22 125 Main Street
23 P.O. Box 37
24 Scotia, California 95565
25 (707) 764-2222
26 (707) 764-4400 – fax
27 amiller@palco.com

28 ¹ Also, please see the attached Proof of Service representing designated parties to the
Regional Water Board proceedings.

1 **IX. STATEMENT THAT COPIES OF THIS PETITION HAVE BEEN SENT TO**
2 **THE REGIONAL WATER BOARD**

3 Copies of this petition have been served on the North Coast Regional Water Quality
4 Control Board. Please also see the Proof of Service attached hereto.

5 **X. STATEMENT THAT ISSUES RAISED IN THIS PETITION WERE**
6 **PRESENTED TO THE REGIONAL WATER BOARD PRIOR TO**
7 **REGIONAL BOARD ACTION**

8 The issues raised in this Petition were presented to the North Coast Regional Water
9 Quality Control Board. Specifically, PALCO's submission in SWRCB/OCC File No. A-1692
10 (maintaining that the enrollment of THPs under the GWDR are not moot) was served on the
11 Regional Water Board on May 10, 2006, before the letter that is the subject of this Petition was
12 sent.

13 **XI. REQUEST FOR HEARING**

14 PALCO is not requesting an immediate hearing in this matter, but reserves the right to do
15 so, and to raise these issues at any hearing in SWRCB/OCC File No. A-1692.

16 **XII. STATEMENT OF ADDITIONAL EVIDENCE**

17 PALCO reserves the right to present at the hearing on its Petition additional evidence that
18 includes, but is not limited to, the following:

- 19 • The improving conditions in the Elk River and Freshwater Creek watersheds.
- 20 • Rebuttal evidence to the statements made in the May 15, 2006 letter.
- 21 • The economic and other impacts to PALCO and the regional economy from the
22 delay in timber harvesting.

23 PALCO was not provided a hearing before issuance of the May 15, 2006 letter. Indeed, it was
24 provided to PALCO five minutes before the start of the May 15, 2006 stay hearing scheduled by
25 the State Water Board in response to Judge Letton's April 26, 2006 ruling.

26 Dated: June 14, 2006

MORRISON & FOERSTER LLP

27 By: 

CHRISTOPHER J. CARR

28 Attorneys for Petitioners THE PACIFIC LUMBER
COMPANY, SCOTIA PACIFIC COMPANY LLC and
SALMON CREEK CORPORATION

Exhibit A

EXHIBIT A



Dan Skopec
Acting Secretary

California Regional Water Quality Control Board North Coast Region

William R. Massey, Chairman

www.waterboards.ca.gov/northcoast
5550 Skylane Boulevard, Suite A, Santa Rosa, California 95403
Phone: (877) 721-9203 (toll free) • Office: (707) 576-2220 • FAX: (805) 788-3579



Arnold
Schwarzenegger
Governor

May 15, 2006

BY HAND DELIVERY AND MAIL

Dr. Jeffrey Barrett
Pacific Lumber Company
125 Main Street
Scotia, CA 95565

Dear Dr. Barrett:

Subject: Status of "Interim Enrollments" of Specified THPs in the Freshwater Creek and Elk River Watersheds in the General Waste Discharge Requirements Order No. R1-2004-0030; Notice of Rescission.

As you know, on Monday of last week, May 8, 2006, the North Coast Regional Water Quality Control Board (Regional Water Board) adopted Watershed-Wide Waste Discharge Requirements for discharges of waste from your company's timber harvest related activities in the Elk River and Freshwater Creek watersheds. (Resolution No. R1-2006-0038, Order No. R1-2006-0039, Resolution No. R1-2006-0040, and Order No. R1-2006-0041, collectively "the WWDRs.")¹

Evidently there is some confusion about the current status of the "interim enrollments" of THPs in these watersheds under the General Waste Discharge Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region (GWDR) (Order No. R1-2004-0030); more specifically THP numbers 00-428 (FW), 01-193 (FW), 03-198 (FW), 04-168 (NF Elk), 00-388 (SF Elk), 00-448 (SF Elk), 02-302 (NF Elk), 03-125 (FW), 03-053 (FW), 04-001 (NF Elk), and 00-259 (NF Elk). I offer this letter to clarify the status of those THPs relative to the GWDRs and WWDRs.

By the express terms of the WWDRs, timber harvesting plan activities in these watersheds by this Discharger are explicitly "not eligible for coverage under the [GWDRs]." (WWDRs, Finding 35.) Coverage for many of the THPs enrolled in the GWDRs continues under the WWDRs and others need not be enrolled in the WWDRs. (See WWDRs, Provision V(F)(2) [automatically grandfathering certain THPs] & (3) [enrollment not required for others].)

¹ The term "WWDRs" refers to both sets of WWDRs and their accompanying resolutions because the portions of each germane to this letter are identical.

California Environmental Protection Agency

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With respect to the THPs whose enrollments are the subject of today's State Water Board's stay hearing, however, the WWDRs state that "[t]o continue operations on those THPs, the Discharger must now enroll those THPs into these watershed-wide WDRs." (WWDRs, Provision V(F)(1).) This requirement, coupled with the above provisions, plainly shows that the WWDRs preempt coverage under the GWDRs

Furthermore, the direction given me by the WWDRs to deal with any residual coverage of THPs under the GWDRs is clear: I must rescind it. The operative provision of the GWDRs states:

"SECTION V: RECISION AND DENIAL OF COVERAGE

- A. The Executive Officer shall rescind or deny the applicability of these General WDRs to a specific Project if the Executive Officer makes any of the following determinations:"

[¶ . . . ¶]

4. Where conditions unique to the watershed or watershed segment (including, but not limited to, cumulative impacts, special hydrographic characteristics, Total Maximum Daily Load standards, the extent of timber harvest activities, intensity of ground disturbing activities, large acreage ownership holdings or management plans, rainslopes, soil, effected domestic water supplies, an increased risk of flooding, or proximity to local, State, or National Parks) warrant further regulation."

After referring to this GWDR Provision in Finding 33 of the WWDRs, the Board went on to find:

"Due to the existing cumulative impacts arising from this Discharger's history of intensive ground-disturbing activities, large acreage ownership, rainfall, slopes, soil, affected domestic water supplies, increased risk of flooding, and other reasons set out herein, the Discharger's proposed watershed-wide Timber Harvesting Plan Activities in Elk River *are not eligible for coverage* under the Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region (Categorical Waiver) (Order No. R1-2004-0016), nor *the General Waste Discharge Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region (GWDR) (Order No. R1-2004-0030)*, adopted by the Regional Water Board on June 23, 2004."

(WWDRs, Finding 35 [italics added].)

Based on the foregoing, I am compelled to conclude that the rescission provision of the GWDRs has been triggered, specifically that "cumulative impacts" "warrant further regulation" of the Freshwater Creek and Elk River watersheds. The Regional Water Board found that Freshwater Creek and Elk River suffer from such cumulative impacts (WWDRs Findings 17-21, 35) and that, accordingly the GWDRs are no longer available.

I am therefore required to inform you that the GWDR enrollments of all Pacific Lumber Company THPs in the Elk River and Freshwater Creek watersheds, including those before the State Water Board today, are hereby rescinded.

To resume operations on any of the previously enrolled THPs, you must follow the enrollment process set out in Provisions V(F) and VII of the WWDRs. My staff informed me last week that they were contacted by Pacific Lumber Company representatives seeking to initiate coverage and/or to verify automatic enrollment of certain THPs under the WWDRs. While written requests for enrollment did not evidently arrive last week as expected, the Regional Water Board staff stands ready to process them once they are received.

I look forward to successful implementation of this process with you, having finally reached some measure of closure on a long and difficult path together.

Please call Bob Klamt of my staff, (707) 576-2693, should you have any questions.

Sincerely,



Catherine Kuhlman
Executive Officer

1 **CERTIFICATE OF SERVICE**

2 I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address
3 is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause,
and I am over the age of eighteen years.

4 I further declare that on June 14, 2006, I served a copy of:

5 **PETITION FOR REVIEW OF REGIONAL WATER BOARD MAY 15,**
6 **2006 NOTICE OF RESCISSION**

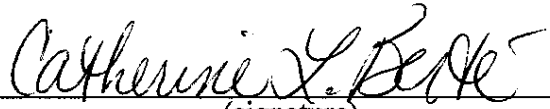
7 by placing a true copy thereof in separate, sealed envelopes addressed as follows:

8 **SEE ATTACHED SERVICE LIST**

- 9 ☐ **BY U.S. MAIL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid,
10 addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco,
11 California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices. I am readily
familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with
the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business
practice the document(s) described above will be deposited with the United States Postal Service on the same
date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and
mailing.
- 12 ☐ **BY FACSIMILE** by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone
13 number 415.268.7522 to the fax number(s) set forth below, or as stated on the attached service list. The
transmission was reported as complete and without error. The transmission report was properly issued by the
transmitting facsimile machine. I am readily familiar with Morrison & Foerster LLP's practice for sending
14 facsimile transmissions, and know that in the ordinary course of Morrison & Foerster LLP's business practice the
document(s) described above will be transmitted by facsimile on the same date that it (they) is (are) placed at
Morrison & Foerster LLP for transmission.
- 15 ☐ **BY OVERNIGHT DELIVERY** by placing a true copy thereof enclosed in a sealed envelope with delivery fees
16 provided for, addressed as follows, for collection by UPS, at 425 Market Street, San Francisco, California 94105-
2482 in accordance with Morrison & Foerster LLP's ordinary business practices. I am readily familiar with
Morrison & Foerster LLP's practice for collection and processing of correspondence for overnight delivery and
17 know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above
will be deposited in a box or other facility regularly maintained by UPS or delivered to an authorized courier or
18 driver authorized by UPS to receive documents on the same date that it (they) is are placed at Morrison &
Foerster LLP for collection.
- 19 ☒ **BY ELECTRONIC SERVICE** by electronically mailing a true and correct copy through Morrison & Foerster
20 LLP's electronic mail system to the e-mail address(s) set forth below, or as stated on the attached service list per
agreement.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct and that this document was executed at San Francisco, California on
June 14, 2006.

23
24 Catherine L. Berté
(typed)


(signature)

SERVICE LIST

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